In the Supreme Court of the United States.

OCTOBER TERM, 1907.

JARIB L. SANDERSON, SURVIVING PARTNER of the firm of Barlow, Sanderson & Co., appellant,
v.
THE UNITED STATES AND THE CHEYENNE tribe or nation of Indians.
} No. 208.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES.

STATEMENT OF CASE.

Judgment in this case was rendered by the Court of Claims in the sum of $7,740 in favor of the appellant and against the United States and the Cheyenne Indians, under the Indian depredation act of March 3, 1891 (26 Stat., 851). The petition alleged certain depredations committed upon the appellant's property by Indians belonging to the Cheyenne tribe at various times in the year 1867. Within two years from the date of the judgment the Attorney-General, acting under the direction of Congress, filed a motion

for new trial under the provisions of section 1088, Revised Statutes, on the ground that fraud, wrong, or injustice had been done to the United States in the rendition of such judgment. This motion was not acted upon by the Court of Claims until after the expiration of more than two years from the time when the judgment was entered. The motion, being then argued and submitted upon its merits, was allowed by the court; and the cause afterward proceeding to trial, the court found that the defendant Indians were not in amity with the United States at the date of the depredations alleged, and dismissed the petition. The claimant thereupon appealed to this court, alleging error in the allowance of the motion for new trial.

The question involved, the power of the Court of Claims to allow a motion for new trial under section 1088, Revised Statutes, of course applies not only to the case at bar but to all cases of which the Court of Claims has jurisdiction; and it affects directly a large number of Indian depredation cases that are in the same attitude as the case at bar.

APPELLANT'S FIRST ASSIGNMENT OF ERROR.

The appellant's first and chief assignment of error is that the Court of Claims had no jurisdiction to grant the defendants' motion for new trial, because more than two years had expired after the entry of final judgment.

The statutes giving authority to file a motion for new trial after the expiration of the term at which

judgment was rendered are section 1088, Revised Statutes:

> The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law;

and the act of Congress approved August 23, 1894 (28 Stat., 476). This act, after making appropriation to pay the judgments of the Court of Claims in this and 258 other Indian depredation cases, provides:

> That no one of the said judgments shall be paid until the Attorney-General shall have certified to the Secretary of the Treasury that he has caused to be examined the evidence heretofore presented to the Court of Claims in support of said judgment and such other pertinent evidence as he shall be able to procure as to whether fraud, wrong, or injustice has been done to the United States, or whether exorbitant sums have been allowed, and finds upon such evidence no grounds sufficient in his opinion to support a new trial of said case; or until there shall have been filed with said

> Secretary a duly certified transcript of the proceedings of the Court of Claims denying the motion made by the Attorney-General for a new trial in any one of said judgments.

The Attorney-General thereupon examined the evidence and filed motions for new trial in 172 cases. The motions were allowed in 77 cases and overruled in 49 cases, the remainder having been withdrawn. All the motions were filed within two years from the date of judgment, *but none of them was acted upon by the Court of Claims within that period.*

Several of the judgments affected by this statute, including the one in the case at bar, were rendered by the Court of Claims on October 11, 1892. One year, ten months, and twelve days of the two years allowed by the statute had elapsed when this legislative direction was given. The motions were filed in time, but the Court of Claims was not in session when the statute was passed nor when the motions were filed. It did not convene after the summer vacation until October 22, at which date more than two years had elapsed since the rendition of the judgment.

The Court of Claims in its ordinary jurisdiction may allow a motion for new trial more than two years after judgment.

There is no statutory limit to the power of the Court of Claims in respect to the granting of new trials. It derives that power from its constitution as a court of record. A rule of the court (Rule 107) requires a motion for new trial to be made at the term in which

the judgment is rendered. When such a motion has been filed, the court may act upon it when it is reached and submitted for decision.

The appellant maintains the contrary of this latter proposition, and cites the dictum in the case of *Belknap* v. *The United States* (150 U. S., 588); but the learned justice who used the language cited in that case did not mean to say that the court would not ordinarily have power to grant a motion after the term, but that it would not ordinarily have power to grant a motion *filed* after the term. This is conclusively shown by the authorities which he cites: *Coughlin* v. *The District of Columbia*, 106 U. S., 7; and *Brooks* v. *R. R. Co.*, 102 U. S., 107.

The learned counsel for the appellant also assumes as a basis for his argument the proposition that by the rule of the common law the trial court was required to dispose of the motion during the term. This proposition we can not assent to, and the authorities cited by him do not sustain it. There is no authority for it in *Belknap* v. *The United States* (*supra*), although the syllabus of that case states the proposition. *Truett* v. *Legg* (32 Md., 149), also cited by him, not only fails to support his proposition but is directly against it. In that case the motion for new trial was filed during the term but was not prosecuted during that term nor for several successive terms thereafter. Finally the court below allowed the motion, and on appeal the Supreme Court of the State affirmed the judgment, holding

that a motion for new trial does not expire with the term of court at which it is made, and that until it is disposed of further proceedings in the case are suspended.

Neither does *Buckner* v. *Conly* (1 B. Mon., 3) support the appellant's contention, although in that case it was held that the court could not act on a motion at a subsequent term unless the court had done some act to suspend the judgment and continue the case. With that condition, the court expressly recognized the power of the trial court to grant a motion at a subsequent term.

In chancery a petition for rehearing is too late if *filed* after the term; but a bill of review based on error of law or newly discoverd evidence may even then be filed. (*Clapp* v. *Thaxter*, 7 Gray (Mass.), 384; *Thompson* v. *Goulding*, 5 Allen, 81.)

In the common law courts the rule required a motion for new trial to be filed before the judgment was perfected. This meant, ordinarily, within the first four days of the term succeeding the trial. (*Birt* v. *Barlow*, 1 Doug., 171; *Rex* v. *Hayes*, 2 Stra., 842; *Rex* v. *Bell*, 2 Stra., 995; *Graddy* v. *Hightower*, 1 Ga., 252; *Jackson* v. *Chace*, 15 Johns. (N. Y.), 354.) But no limit appears to have been imposed upon the power of the court to hear such motions after the term, or at any time.

In the absence of statutory regulation, the time for filing motions for new trial is fixed by the rule of the court; and it is generally held that a motion is in

time if filed at the term when judgment was rendered, although in extraordinary cases the court may allow it to be filed at a later term; and that when once filed the court may hear and determine the motion at its pleasure and at the convenience of the parties.

Graddy v. *Hightower*, 1 Ga., 252.
Conklin v. *Hinds*, 16 Minn., 457.
Felton v. *Spiro*, 78 Fed., 576.
Johnston v. *Simmons*, 77 Ga., 298.
King v. *Carey*, 5 Ga., 270.
Pace v. *Nealing*, 21 Ga., 464.
State v. *First National Bank*, 4 Nev., 358.
Constantine v. *Foster*, 57 Ill., 36.
Hearson v. *Graudine*, 87 Ill., 115.

Citations to this effect could be multiplied, but it is unnecessary. There can be no doubt that the practice of the courts of this country overwhelmingly sustains the proposition that when jurisdiction is acquired by the court over a motion for new trial filed in time, such jurisdiction continues until the motion is acted upon. In actual practice for a long series of years, the Court of Claims has followed this rule. Cases in which motions for new trial have been allowed after the term, and in some cases several years after, are here referred to.

Grantham v. *United States*, 28 C. Cls. R., 528.
Gorham v. *United States*, 29 C. Cls. R., 97.
Graham v. *United States*, 30 C. Cls. R., 318.
Valencia v. *United States*, 31 C. Cls. R., 388.
Coe et al. v. *United States*, 31 C. Cls. R., 441.
Trabing v. *United States*, 32 C. Cls. R., 440.

Litchfield v. *United States*, 32 C. Cls. R., 585, and 33 C. Cls. R., 203.

McCollum v. *United States*, 33 C. Cls. R., 469.

Rhine v. *United States*, 33 C. Cls. R., 481.

Jaeger v. *United States*, 33 C. Cls. R., 214.

Contzen v. *United States*, 33 C. Cls. R., 475.

Potter v. *United States*, 34 C. Cls. R., 13.

Vaughn v. *United States*, 34 C. Cls. R., 342.

Rush v. *United States*, 35 C. Cls. R., 223, and 33 C. Cls. R., 417.

Jones v. *United States*, 35 C. Cls. R., 36.

Collins et al. v. *United States*, 35 C. Cls. R., 122.

Ship Parkman, 35 C. Cls. R., 406.

De Baca v. *United States*, 36 C. Cls. R., 407.

Pino v. *United States*, 38 C. Cls. R., 64.

McCoy v. *United States*, 38 C. Cls. R., 163.

Butler v. *United States*, 38 C. Cls. R., 167.

Anthracite Mesa Co. v. *United States*, 38 C. Cls. R., 56.

Summey v. *United States*, 39 C. Cls. R., 199.

Murphy v. *United States*, 39 C. Cls. R., 178; 38 C. Cls. R., 511.

Brig Lucy, 39 C. Cls. R., 221; 37 C. Cls. R., 97.

Le More & Co. v. *United States*, 39 C. Cls. R., 484.

Schooner Atlantic, 39 C. Cls. R., 193; 37 C. Cls. R., 17.

Burnham v. *United States*, 40 C. Cls. R., 166.

Brig Juno, 41 C. Cls. R., 106; 36 C. Cls. R., 239.

Brown v. *United States*, 41 C. Cls. R., 275.

An apology is perhaps due to the court for presenting at such length a proposition that is so clear. The excuse for doing so must be found in the appellant's apparently serious contention and his reliance upon the opinion of this court in *Belknap* v. *The United States.*

Section 1088, Revised Statutes, extends the time for filing motions for new trial and does not limit the time within which the court must consider them.

The Court of Claims has directly held in a well-considered opinion handed down more than thirty years ago that it has power to allow a motion under this statute after the expiration of more than two years from the date of the judgment, if the motion was filed in time. (*Bellocque* v. *The United States,* 13 C. Cls. R., 195.)

It has followed that decision in the following reported cases, and in many others not reported:

Graham v. *The United States,* 30 C. Cls. R., 318.

Valencia v. *The United States,* 31 C. Cls. R., 388.

Coe et al v. *The United States,* 31 C. Cls. R., 441.

Trabing v. *The United States,* 32 C. Cls. R., 440.

Litchfield v. *The United States,* 32 C. Cls. R., 585, and 33 C. Cls. R., 203.

McCollum v. *The United States,* 33 C. Cls. R., 469.

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The decision in the *Bellocque* case has been regarded as settled law in the Court of Claims since 1877 and has never before been questioned. It has been followed, as we have seen, in at least 126 cases.

We have shown that a motion filed during the term may be heard by the Court of Claims after the expiration of more than two years. What, then, did Congress intend by the enactment of section 1088, Revised Statutes? This court has said that the statute was passed for the protection of the United States (*Young* v. *United States*, 95 U. S. 641), and that it was undoubtedly intended to give the Government an unusual, if not unprecedented, advantage (*Ex parte Russell*, 13 Wall., 668). The only way in which the statute gives the Government any advantage is by giving additional time in which a motion for new trial may be filed by the United States. If it does not accomplish this it does not accomplish anything. If it does not extend the time within which the defendants may file their motion it is so much waste paper; for it certainly does not extend the time within which the court may allow the motion.

The statute, then, it must be conceded, removes, as to the United States, the requirement that a motion for new trial must be filed within the term at which judgment was rendered. It extends the time within which the counsel for the United States may file his motion.

How far does the statute extend this time? Within what time must the United States take advantage

of the statute? There can be but one answer to that question. The statute names but one limit, and that limit, as we have seen, must necessarily apply to the filing of the motion. The motion may, therefore, be filed at any time within two years after the rendition of the judgment. It may be filed on the last day of the second year; it may be filed on the last hour of that day, and in the last minute of the last hour.

This proposition established, the assignment of error must fail. For it can not seriously be contended that the statute permits the filing of a motion for new trial and also requires the court to act upon that motion within the same instant. Such a construction would be absurd; and there is no escape from it if the contention of the appellant prevails. It can not be that the counsel for the United States must agree with the court on a division of the time limit fixed by the statute; it can not be that he is required at his peril to estimate the time that the court may take in deciding the motion. Must he allow the court three months' time or a week? Must he take into account the periods of vacation, when the court is not in session? Assuming that such a motion may be allowed in vacation, must he inform himself of the whereabouts of the Chief Justice, consider the time necessary to reach him and the time required by him for deliberation, and curtail the statutory period by so much in order to enable the court to act upon the motion within that period? Suppose the grounds for new trial do not come to the knowl-

edge of the Attorney-General until the last day of the two years; suppose the court desires argument on the questions involved before passing upon the motion; suppose the court desires more time for deliberation than the Government's counsel has estimated; must the motion fail for these reasons? The construction contended for would deny the court the right to have additional light upon the case. It would limit the time within which the motion might be considered to an hour, to a minute perhaps, or to an infinitesimal division of an instant of time. It is inconceivable that such was the intention of Congress.

Again, the state of the calendar would have to be considered. A motion for new trial, like other business before the court, must await its turn. The time of the court may be so fully occupied with cases of equal urgency that a motion can not be heard immediately. To say that in such circumstances the motion must fail would be an arbitrary denial of justice.

A rule of the Court of Claims provides that all motions which have been on the calendar for more than two years may be submitted on motion of either party (Rule 93). No method is provided for a submission before that time by the moving party alone. If the appellant's contention here be upheld, the opposing party might in any case defeat the jurisdiction of the court by delaying the hearing of the motion until after the time had expired. The construction

contended for by the appellant would deny to the defendants rights under section 1088 equal to those that they have under the ordinary jurisdiction of the court. Instead of being an advantage, it would be a disadvantage.

The statute should be liberally construed in favor of the Government. This court has said that "before any judgment should be rendered binding the United States, it is familiar and settled law that the statute claimed to justify such judgment should be clear and not open to debate." (*Leighton* v. *The United States*, 161 U. S., 291, 297.)

The statute not mandatory.

It is not necessary, in order to reach the conclusion we have reached, to do violence to the language of the statute. It does not require action to be taken by the court within two years. To quote the language of the Court of Claims in the case of *Bellocque* v. *The United States* (13 C. Cls. R., 195):

> As there is no statutory declaration that action upon such a motion shall not be taken after the expiration of two years, the right to take such action survives the lapse of that period and it is competent for the court to hear and determine the motion whenever it shall thereafter be properly brought up.

The learned counsel for the appellant attacks the reasoning of the court on the ground that it assumes that the Court of Claims may, in the absence of an express statutory provision, grant a motion for new

trial properly filed, at any time. This assumption he combats. But, as we have just demonstrated, the assumption is perfectly sound; and with this light on the question, the reasoning of the Court of Claims in the *Bellocque* case, both in the paragraph quoted above and in the other portions of the opinion, is sound and unanswerable.

The appellant cites certain decisions as tending to sustain his contention. They are all based upon statutes, and to ascertain whether they are in point it is necessary to refer to the statutes. These are, with one exception, clearly distinguishable in effect from section 1088, Revised Statutes. The exception is in the case of *Vaughn* v. *O'Connor* (12 Nebr., 478). The statute upon which that case depended is quoted in the appellant's brief (p. 12) and is similar in language to section 1088, Revised Statutes; but the decision in *Vaughn* v. *O'Connor*, following *Cox* v. *Tyler* (6 Nebr., 297), hinged on the fact that justices of the peace and probate or county judges were both governed by the code relating to courts of justices of the peace and had no power whatever to grant a motion for new trial except that given to them by the statute in question. The Court of Claims, on the other hand, has an inherent power to grant motions for new trial, and its jurisdiction is not to be measured by the rules applicable to that of a justice of the peace.

Coopwood v. *Pruett* (30 Miss., 206) is not in point. That was a case where the judge took the case under

advisement and handed in a decision to the clerk's office two months after his term of office as a judge had expired.

James v. *Appel* (192 U. S., 129) was decided on the familiar principle that, the statute of Arizona having been copied from a Texas statute, which had long been judicially construed, the construction was adopted with the statute. That case and the other Arizona cases and the Texas cases depend upon a statute which expressly declares that motions for new trial must be made within two days after verdict or judgment and that "such motions must be disposed of at the term at which the motion is made." (Revised Statutes, Arizona, 1887, paragraphs 836, 837; 1 Sayles Texas Civil Statutes, 1372.) This is far stronger language than that which we are here called to construe; yet in the Arizona courts at least the reasonableness of the decision is further strengthened by a supplemental statute providing in effect that if the motion be not acted upon by the court it shall be taken as overruled, with exceptions reserved, and shall be determined by the Supreme Court on appeal. (Acts of 1891, No. 49, p. 69.)

The Alabama cases do not sustain the appellant's contention, but are directly opposed. In that jurisdiction it is held that "if during the term at which the judgment is rendered a motion for new trial is made and continued, the court may at a subsequent term hear and decide it." (*Ex parte Highland Ave. and Belt R. R. Co.*, 105 Ala., 221; *Hundley* v. *Yonge*, 69 Ala., 89; *Fitzpatrick* v. *Hill*, 9 Ala., 783.)

In Arkansas also the statute expressly required that all motions for new trial be determined at the term of court during which they were made (Revised Statutes, Arkansas, 1838, p. 637, §130); yet it is held that under that statute the court may consider a motion after the term has expired, provided it is specially continued during the term. (*Walker* v. *Jefferson*, 5 Ark., 23.)

In Indiana it was first held that such a statute was directory merely (*Fergus* v. *Hawthorn*, 30 Ind., 444), on the ground that when the moving party was not at fault the delay of the court could not deprive him of his right. Subsequent cases were in conflict with this and it was expressly overruled in *Crews* v. *Ross* (44 Ind., 481). At the next revision of the statutes the paragraph was amended so that the former rule now prevails. (*Rodman* v. *Reynolds*, 114 Ind., 148.)

In other jurisdictions statutes equally direct in language and far stronger in favor of the appellant's contention than section 1088, Revised Statutes, have been held to be directory merely and not mandatory. The effect given them is that contended for here—to limit the time of filing the motion and to avoid the loss of rights to a diligent party by the mere failure of the court to act. The Colorado code contains this provision:

> Provided always that the motion for new trial and decision thereon shall be made and had at the same term the findings were made or the verdict rendered.

In construing this provision and holding it to be directory merely, so far as the action of the court is required to be performed within a specified time, the court said:

> It is the duty of courts to use all reasonable diligence in the decision of motions and other matters presented for their determination, but to say that they shall all be decided at the same term during which they were presented, regardless of their importance or difficulty or of the time of submission, would be unreasonable. * * * It not infrequently happens that these motions are presented and argued or submitted upon briefs on the last day of the term. In many instances they require a thorough review of the evidence, and they often involve the examination of authorities not previously brought to the attention of the court. If the provision is held to be mandatory, the effect will be to require many of these motions to be decided without due consideration, a result which will defeat the spirit and intent of the statute. (*Gomer* v. *Chaffee*, 5 Colo., 383.)

A similar statute in California has been held to be directory and not mandatory (*McQuellan* v. *Donohue*, 49 Calif., 157). See also *Vermute* v. *Shaw*, 4 Calif., 214, and *Broad* v. *Murray*, 44 Calif., 228.

The injustice of allowing the inaction of the court to prejudice the rights of parties is set forth by the Supreme Court of Georgia in the case of *Johnston*

v. *Simmons* (77 Ga., 298), where a motion for new trial was made during the term and a consent order was taken providing that the judge before whom the case was tried should take the motion with him and pass upon it "within the next thirty days in vacation," and the judge failed to decide the motion within that time. The court held that this did not operate to prevent its decision at a subsequent term, saying:

> It seems to us that the only legal consequence of the failure by the judge to exercise the authority conferred upon him by such order would be to leave the motion still pending. We can not understand how mere inaction on his part could result to the detriment of the plaintiffs in error.

A distinction might reasonably be made between such a motion as that in the case at bar, which is based upon a printed record of evidence, and a motion made on the minutes, where the evidence is preserved only in the recollection of the trial judge. The statutes make this distinction in some States and require such a motion to be heard at the same term; yet even such motions may be heard after the term, if made in proper time. In Wisconsin such a motion made within the term was heard by the court ten years afterwards and the decision sustained by the Supreme Court. (*Hinton* v. *Coleman*, 76 Wis., 221.) Such a motion can be kept alive after the term by the stipulation of the parties. (*Steinhofel* v. *R. R. Co.*, 92 Wis., 123.)

In Minnesota the statute provides that "such motions in cases hereafter tried, if heard upon the minutes, can only be heard at the same term of court at which the trial is heard." (General Statutes 1878, chap. 66, § 254; General Statutes 1894, § 5399.) It was held, however, that a motion made in time may be argued, submitted, and decided at a subsequent term and that the defendant waived the objection by appearing and arguing the motion on the merits, or even by waiting until after the plaintiff had called up the motion and argued it before making his objection. (*Gribble* v. *Livermore*, 64 Minn., 396; *Larsen* v *Ross*, 56 Minn., 74.)

A review of these decisions shows the tendency of the courts to go to almost any length rather than permit the inaction of the court to prejudice the rights of a diligent party. In this case, however, it is not necessary to go so far, or in any degree to strain the language of the statute. The two statutes under which the motion was made clearly contemplated the extension of the time for filing the motion, as that is the only effect which can be given to them. It is equally clear that they extend that time to a full two years from the date of the judgment. The act of August, 1894, required the motions to be filed, although the court was not in session and did not convene until after the two years' limitation had expired. When the motions had been made in accordance with the statute the court acquired jurisdiction over them, and the statute itself had expressly suspended the pay-

ment of the judgments until the court acted upon the the motions (28 Stat., 476). There is nothing in either statute which limits the time within which the court must act in the exercise of the jurisdiction thus acquired.

SECOND ASSIGNMENT OF ERROR.

Under the second assignment of error the appellant contends that the motion made by the United States was not sufficient because evidence was not offered in its support. It does not appear upon what part of the record this assignment is based. The record does not show what evidence was offered in support of the motion. Such evidence would not be properly a part of the record on appeal. If the motion was made in time, it was addressed solely to the discretion of the Court of Claims, and the action of that court upon the motion is conclusive and not subject to review. (*Young* v. *The United States*, 95 U. S., 641.) The authorities cited by the appellant do not sustain his contention that the evidence as well as the motion must be filed within the two years' period.

But the evidence was, as a matter of fact, before the court as soon as the motion was filed. The motion was based upon the fact that the United States and the Cheyenne tribe of Indians were at war at the time specified in the petition. This is a matter of which the court is bound to take judicial notice. The evidence was contained in the history of the times and was documentary in character.

Such evidence was, of course, never filed in the court, but was simply referred to in argument, the documents being equally accessible to the court and to the opposing counsel.

THIRD ASSIGNMENT OF ERROR.

The appellant contends further that because the original judgment was rendered upon a so-called "stipulation of facts in allowed claims" the court had no power to grant a motion for new trial. This statement he qualifies by the admission that such a power would exist if a question of fraud were concerned. This admission defeats his argument.

This is an allegation of error in a matter which is not subject to review. "A case having been made upon the record such as would justify its interference, that court [the Court of Claims] had the right to hear the evidence and decide. Over its decision within that jurisdiction we have no control, for the statute has not provided an appeal." (*Young* v. *The United States*, 95 U. S., 641, 643.)

The assignment is not sustained by the record. The motion was based upon an allegation of fraud, wrong, or injustice, following the words of the statute. The motion was allowed by the Court of Claims without any statement of its reasons. The evidence is not before this court. For aught that the record contains or that counsel knows, the court may have held that the so-called "stipulation of facts" was a fraud upon the United States.

This alone is a sufficient answer to the appellant's argument.

But, assuming, for the sake of the argument, that no question of fraud existed, did the court, after having rendered judgment as provided by law in a claim based upon section 4 of the Indian depredation act, have the power to set aside that judgment under the provisions of section 1088, Revised Statutes? To answer this in the negative would be to hold that the court had no power whatever over the judgment after it had once been rendered.

The Court of Claims has answered that question in the case of *McCollum* v. *The United States* (33 C. Cls. R., 469, 472):

> The conditions which the Congress annex to the right to sue the United States can not be waived, and so judgments rendered by agreement of parties, as in the case at bar, have no more sanctity in respect of motions for new trial than judgments rendered in litigated cases.

A legislative construction of the statute as applicable to this and similar cases is found in the act of August 23, 1894, hereinbefore referred to. That act contemplated and directed the filing of motions for new trial in a considerable number of cases wherein judgments had been rendered upon the allowance of the Secretary of the Interior and under the form of a stipulation similar in all respects to the one contained in the record in this case.

The "Stipulation of Facts."

The "stipulation of facts in allowed claims" upon which the judgment was rendered was unauthorized by the statute, and therefore null and void. It proceeded on the assumption that the claim was one which was properly included in the third proviso of the fourth section of the jurisdictional act. It is there provided:

> That all unpaid claims which have heretofore been examined, approved, and allowed by the Secretary of the Interior, or under his direction, in pursuance of the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and subsequent Indian appropriation acts, shall have priority of consideration by such courts.
>
> And judgments for the amounts therein found due shall be rendered, unless either the claimant or the United States shall elect to reopen the case and try the same before the court, in which event the testimony in the case given by the witnesses and the documentary evidence, including reports of Department agents therein, may be read as depositions and proofs.

The "subsequent acts" referred to in the statute were merely provisions in the successive appropriation bills for continuing the investigation and have

no bearing upon the point at issue. The act of March 3, 1885 (23 Stat., 376), authorized the Secretary of the Interior to examine and allow claims "on account of depredations committed *chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States.*" Thus the jurisdiction of the Secretary was limited to cases in which the Indian tribe had by treaty stipulation made itself liable for the depredations committed by individuals of the tribe. The court has held that the allowance by him of a claim against a tribe not bound by an express treaty stipulation was absolutely void; and that in such a case the claimant could not have his election to proceed under the allowance by the Secretary, but must come into court and try his case as if no attempt had ever been made by the Secretary of the Interior to act upon it. (*Mares* v. *The United States*, 29 C. Cls. R., 197; *Labadi* v. *The United States*, 31 C. Cls. R., 205.)

The claim in this case was against the Cheyenne tribe of Indians and the depredations were committed in the year 1867. A treaty was concluded between the United States and the Cheyenne tribe of Indians on October 14, 1865 (14 Stat., 703). The ninth article of that treaty provided that "upon the ratification of this treaty, all former treaties are hereby abrogated." The treaty was ratified on May 22, 1866. No subsequent treaty was made before the commission of the depredations complained of. The treaty of 1865 was, then, the only existing treaty

by which to measure the obligations of the Cheyenne Indians at the time of the depredations in 1867; and that treaty contained no provision for the payment of Indian depredation claims.

Even if the treaty of 1865 had not abrogated all former treaties, there was no existing treaty with the Cheyenne tribe which authorized the Secretary of the Interior to charge them with the payment of damages for a depredation committed by individuals of the tribe. The treaty of 1825 did not contain any such authority. (*Labadi* v. *The United States and the Cheyenne Indians*, 31 C. Cls. R., 205.)

In the case last cited it was also held that for a depredation committed by Cheyenne Indians in 1854 the Secretary had no authority to allow a claim; but the Court of Claims afterwards held that such authority could be found in the so-called Fort Laramie treaty of 1851. (*Moore* v. *The United States and Cheyenne Indians*, 32 C. Cls. R., 593.) That case has not yet been finally decided, and consequently the question has not come before this court; but the appellees submit with confidence that the Secretary derived no authority from the agreement in question, because it was never finally ratified. Its history is given in the opinion of the Court of Claims last cited. It there appears that the treaty was negotiated with a provision for the payment of annuities to the various tribes concerned for a period of fifty years. The Senate ratified the treaty, with an amendment reducing that period to ten years, thus cutting off

four-fifths of the consideration to be received by the tribes for the concessions made by them. Some of the tribes consented to this amendment, while others did not. The treaty was therefore never finally ratified, was never proclaimed by the President, and does not appear in the Revised Statutes, where all treaties are published.

A treaty in law is "a league or contract between two or more nations or sovereigns, in modern usage formally signed by commissioners properly authorized and solemnly ratified by the several sovereigns or the supreme power of each state" (Century Dictionary).

By the Constitution of the United States the treaty-making power is vested in the President, by and with the advice and consent of the Senate. It follows, of course, that no "treaty" can be made except by the concurrent action of the President and the Senate; and that any agreement, no matter what its subject and no matter how it be regarded by Congress, or how much soever it be acted upon by any Department or by any single branch of the Government, is not a treaty until it has been approved and ratified by the authority and in the form provided by law and by the Constitution. The "Fort Laramie treaty" of 1851 was never ratified and never proclaimed by the President, and the agreement was therefore not a treaty; moreover, the article of the agreement which refers to depredations (Article IV) is expressly made contingent on the ratification of the treaty, which never took place. Both for the general reason,

that the treaty is not operative and can not be enforced, and for the particular reason, that the condition upon which the agreement to make indemnity rested has not been fulfilled, such agreement is not and never has been binding upon the Cheyenne tribe.

Viewed in the light of an ordinary contract, the agreement would be equally inoperative. There was never a meeting of the minds of the two contracting parties. The consideration expressed in the original draft was reduced by 80 per cent in the amended draft which was submitted to the Indians for their consent, which they never gave. Such a contract would not be held binding between ordinary parties; and the parties to this agreement were, on one side, various tribes of Indians, and it has been the policy of this court from the beginning to interpret such agreements most favorably to the Indian tribes.

For these reasons the Secretary of the Interior had no authority to allow the claim under the so-called treaty of Fort Laramie, even if it had not been superseded before the time of the depredations charged in this case.

Even if the treaty of Fort Laramie was ever operative, it was abrogated by the treaty of 1865 (*supra*). That treaty was made with the "Confederated Tribes of Arapahoe and Cheyenne Indians of the Upper Arkansas River." That some of the members of the tribes were not represented at the conference is shown by the eighth article, in which the

Indians "expressly covenant and agree that they will use their utmost endeavor to induce that portion of the respective tribes not now present to unite with them and accede to the provisions of this treaty, which union and accession shall be evidenced and made binding on all parties whenever such absentees shall have participated in the beneficial provisions of this treaty."

It was argued in the court below that this language and the language of the caption showed that only a part of the tribe joined in the treaty and that a part of the tribe can not abrogate a prior treaty made by the whole tribe. But the language of the treaty will not bear this interpretation. There was but one tribe of Cheyenne Indians known as such, and no division of that tribe has ever been recognized by the United States. A small band of the Northern Cheyennes were associated with the Northern Sioux, but they do not figure in this treaty. The caption of the treaty in the statutes, the caption in the "Revision of Indian Treaties," and the preamble to the treaty all describe the contracting parties as "the Cheyenne and Arapahoe tribes of Indians" without qualification (14 Stat., 703; Revision of Indian Treaties, 122). The language of the treaty itself, in which the portion of the tribe not present at the council are described as "absentees" and in which their adhesion to the treaty is to be signified merely by their acceptance of its benefits, shows that they were referred to only as individuals and not as a

body capable of making or marring a treaty. The appellant can not question the validity of the treaty after its ratification both by the tribe and the United States, and its proclamation by the President. (*Fellows* v. *Blacksmith*, 19 How., 366, 372.)

Again, if the previous treaties had not been expressly abrogated by the treaty of 1865 they were abrogated by the war between the United States and the Cheyenne Indians in 1864–65. (*Litchfield* v. *The United States*, 32 C. Cls. R., 585.) It can not be contended that the old treaty was revived after the termination of hostilities, because a new treaty was then immediately negotiated, which expressly abrogated all former treaties. If, however, it could be claimed that such treaties were revived notwithstanding that abrogation, they were undoubtedly again abrogated, and ceased to have any effect when in the spring of 1867 the same tribe and the United States were again at war, as held by the Court of Claims in the case at bar. It would be absurd to hold that an agreement on the part of the tribe to pay for the destruction of property by individuals was effective during a state of hostility between the tribe and the United States, when such individuals might constitute a war party authorized by the tribe to perform the destruction complained of as a very incident to that state of hostility.

Since there was no treaty obligation to pay for depredations, it follows that the Secretary of the Interior had no jurisdiction or authority to allow

the claim; that the attempted allowance by him was absolutely void; that the case was not one which could be passed upon by the Attorney-General and submitted to the court for a *pro forma* judgment on the election of the parties not to reopen; that the stipulation based on the contrary assumption was wholly void, because it was unauthorized by the statute; and that the court was not bound in any way by such unauthorized stipulation.

The court without jurisdiction.

Not only was the stipulation void for the reason given above, but it attempted to confer upon the court a jurisdiction which it did not possess. It is elementary that jurisdiction can not be conferred by the consent of the parties.

The Cheyenne Indians were not in amity at the date of the depredation. The Court of Claims was therefore without jurisdiction under the first section of the statute, which requires amity as a condition to jurisdiction. But the appellant maintains that the court had jurisdiction of the case under the second paragraph of the first section of the act of March 3, 1891. The paragraph referred to reads as follows:

> Such jurisdiction shall also extend to all cases which have been allowed by the Interior Department and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipula-

> tions with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and under subsequent acts, subject, however, to the limitations herein provided.

The punctuation in the above extract is that in the Statutes at Large. The citation of the same statute given on page 20 of the appellant's brief, which ends with a period after the word "Department," is incomplete and misleading.

The statutes referred to in the above extract are the same as those enumerated in the fourth section considered above. The provisions of this paragraph embrace the claims referred to in that section (section 4) and also all claims authorized to be examined, and not actually examined, under the same statutes. It is clear that the words, "under the act of Congress making appropriations," etc., modify both classes of cases embraced in the preceding words of the section. What claims, then, were authorized to be examined? Only the claims against the tribes which had bound themselves by treaty to pay for depredations committed by their members. (*Mares* v. *The United States, supra.*) This was not such a claim. We have just seen that the Secretary's allowance was void for want of jurisdiction; and this claim was therefore neither an allowed claim nor one "authorized to be examined" under the same statutes.

It follows that, since this claim falls in neither of the two classes, the Court of Claims did not take juris-

diction under the second paragraph and was wholly without jurisdiction to award judgment for the claimant.

The position taken here, as to the jurisdiction of the Court of Claims, is opposed to the dictum in the *Leighton* case, relied upon by the appellant. The point was not material in that case and was not directly decided there. It is clear from the opinion that in the argument of that case it was assumed that the Secretary of the Interior had made a valid allowance of the claim; and, assuming that to be the case, the court said:

> It follows, therefore, that though under the terms of the second jurisdictional clause the Court of Claims had jurisdiction over this claim, yet the case having been reopened by the claimant, the Court of Claims properly proceeded to inquire into its merits and correctly found that there was no law or treaty upon which to base a liability of the United States or the Indians. (*Leighton* v. *The United States*, 161 U. S., 291, 297.)

A more correct understanding of the effect of this decision can perhaps be obtained from the syllabus than from a consideration of one sentence disassociated from the remainder of the opinion. The syllabus says that under the first clause of the statute the Court of Claims was without jurisdiction to render a judgment against the United States and that "the same result is reached practically if the claim is regarded as within the jurisdiction of that court

under the second jurisdictional clause." The statement in the paragraph quoted above was provisional and it was not necessary to the decision of the case, since the judgment of the Court of Claims was affirmed in any event.

The stipulation in this case contained the statements of fact (1) that the claim had been allowed under the provisions of the act of March 3, 1885, and (2) that the defendant Indians were in amity with the United States. One or the other of these facts was necessary to give the court jurisdiction; but both were erroneous, and such an erroneous stipulation of fact could not operate to confer jurisdiction upon the court. That the Court of Claims may, under section 1088, Revised Statutes, allow a motion for new trial in any case where, because of an error in fact it had assumed a jurisdiction which it did not possess, ought not to be controverted.

FOURTH ASSIGNMENT OF ERROR.

Under the fourth assignment of error, the counsel for the appellant assumes that the motion for new trial was based upon error of law and not of fact; but the finding of the court shows that the defendant Indians were not in amity with the United States, and it has been repeatedly held that amity is a mixed question of fact and law. (*Marks* v. *The United States*, 28 C. Cls. R., 147; 161 U. S., 297.) In every case where the question of amity has been before this court, it has been upon a finding of fact on the part of

the Court of Claims that the Indian tribe was not in amity with the United States.

Counsel's assumptions in regard to the prior construction of the statute are not justified by anything in the record or in the reports.

FIFTH ASSIGNMENT OF ERROR.

Under the fifth assignment of error the appellant contends that the United States is not entitled to take advantage of the statute and move for a new trial, because the judgment is primarily against the Cheyenne Indian tribe, and because, as he contends, the Cheyenne tribe has annuities sufficient to satisfy the judgment. His contention is in effect that a wrongful judgment against the United States should be allowed to stand because the United States can not be compelled to pay it.

A sufficient answer to this is found in the opinion of this court in the case of *Leighton* v. *The United States* (161 U. S., 291), where it is said:

> Nor is this a matter in which the Government is uninterested. In case of an award by the Court of Claims the United States becomes in fact, if not in form, the primary and a solvent judgment debtor. The recourse provided over against the Indian tribe, while it may be certain as to amount, is uncertain as to collection, and before any judgment should be rendered binding the United States it is familiar and settled law that the statute claimed to justify such judgment should be clear and not open to debate.

That the United States is in this case "in fact, if not in form, the primary and solvent judgment debtor" is shown by the fact that an appropriation was made by Congress to pay the judgment, the claimant being identified by name (28 Stat., 476; Senate Ex. Doc., No. 82, Fifty-third Congress, second session). That appropriation is still available; and if the judgment were revived the Secretary of the Treasury would be required, under the terms of the appropriation act, to pay the judgment from the Treasury, provided the Secretary of the Interior in his discretion, "having due regard to the educational and other necessary requirements" of the Cheyenne tribe, should certify that no deduction should be made from their funds. This certification would undoubtedly be made by the Secretary of the Interior. No such judgment has ever been paid out of the Cheyenne funds, and it is not probable that one ever will be.

So long as a wrongful judgment exists against the United States, it can not be said that the statute does not apply. The court will not inquire into the solvency of joint judgment debtors, and permit a judgment to stand against one party because the other party can be compelled to pay the whole amount of the judgment.

SIXTH ASSIGNMENT OF ERROR.

The appellant contends that—

> The court erred in dissmissing claimant's petition on April 23, 1906, because the judg-

ment of October 11, 1892, in so far as the same was against the defendant Cheyenne Indians, was then a valid and subsisting judgment and in full force and effect, no proceedings to vacate the same having been instituted.

This assignment of error raises two questions: First, whether the provisions of section 1088, Revised Statutes, are available for the protection of the defendant Indians in such a case as this; and, secondly, whether, assuming that the motion for new trial was made on behalf of the United States alone, it was error in the Court of Claims to set aside the judgment against both the United States and the Indian tribe.

At the time section 1088 was enacted, the jurisdiction of the Court of Claims was confined to suits in which the United States was the sole defendant. When the jurisdiction of the court is enlarged from time to time the statute, which is general in its terms, becomes applicable to the new class of cases. It was so in the District of Columbia cases, although the statute there expressly provided that all motions for new trial must be filed within twenty days (21 Stat., 285). The Court of Claims denied a motion for new trial under section 1088 for want of jurisdiction; but when the case came to this court, the motion was considered on its merits and the court held that it was not a proper motion under that statute, because founded on error of law and not on error of fact. (*In re District of Columbia*, 180 U. S., 250.)

In the Indian depredation act there is no language excepting the cases arising under it from the provisions of section 1088, which is therefore applicable as in other cases. (*McCollum* v. *The United States*, 33 C. Cls. R., 469.)

The language of the statute does not limit its application to claims against the United States alone. It reads, "The Court of Claims at any time while *any claim* is pending before it, * * * may on motion on behalf of the United States grant a new trial and *stay the payment of any judgment therein*." We contend that although the motion be made on behalf of the United States, the language of the statute not only permits but requires the court to grant a new trial of the claim—not a new trial as to the liability of the United States alone, but a new trial of the whole case. The provision for staying the judgment is sufficient to indicate this construction of the statute. There is but one judgment rendered in such a case. It is a thing entire and indivisible. If it be set aside as to the United States, it can not stand against the Indian tribe. Under the jurisdictional act, no case can arise where the tribe is liable and the United States is not. The court can not render a judgment against an Indian tribe without at the same time rendering it against the United States. Has it then the power to do indirectly that which it can not do directly?

The statute requires the Attorney-General to appear for the Indians as well as for the United

States; and where the tribe has not availed itself of the privilege of employing counsel, he is their sole legal representative. His act is their act. The United States and the tribe stand in the relation of guardian and ward. It is a reasonable construction of the Statutes to hold that when Congress required the tribe to submit itself to the court as a joint defendant with the United States and committed its interests to the legal representative of the United States, it was intended that the ward should have the benefit of the same guaranties against wrongful judgments that are enjoyed by the guardian. It has long been the doctrine of this court that the Indians are entitled by reason of their relations with the Government to the tender care of the courts; and that all legislation respecting them shall be interpreted as intended for their benefit. (*Marks* v. *The United States*, 161 U. S., 297.)

The appellant contends further that the Court of Claims had the power to allow a motion for new trial on behalf of one of several defendants without disturbing the verdict as to the other defendants, and he cites several cases in support of that contention, admitting, however, that there is a conflict of authority on the question. He relies upon the case of *Albright* v. *McTighe* (49 Fed. R., 817) as showing that the weight of authority is in favor of the power of the court to sever the judgment. It is somewhat remarkable that in that very case, while the court argued in favor of its power to allow a motion as to

one defendant and overrule it as to the others, it did not take that action. The court said:

> However technically we may have the power (and I do not doubt it) to enforce against two a verdict which was given against three, it seems to me it would be yielding too much to a sense of justice of an outraged plaintiff and in some sense would be assuming the power and authority of the jury in fixing the damages, for the court to discharge one of three and hold only the other two, when the jury had not had their attention called to the matter in any way.

In the *Indiana* case, which was upon contract, the question was merely one between several defendants, there being no ground for new trial as against the plaintiff.

In *Bremen Bank* v. *Umrath*, 55 Mo. App., 43, the court held that it was error to set aside the verdict as to all the defendants *where their liability is several and not dependent upon the same conditions.*

In *Union Bank* v. *McClung*, 9 Humph., 98, also cited by the appellant, the court held that no new trial could be granted as to one without granting it as to all, in actions against joint defendants upon contract at common law; but held that the rule was modified by statute in that state.

The remaining cases cited by the appellant are either not in point or they are actions against joint tort feasors, where the liability is joint and several.

On the other hand, the rule at common law was clear that if a motion for new trial was granted as to one joint defendant there must be a new trial as to all.

2 Tidd's Practice, 9th Ed., 911.
3 Salk., 362.
Bond v. *Sparks*, 12 Mod., 275.
Parker v. *Godin*, 2 Stra., 813.
Doe v. *Martin*, 13 M. & W., 810.

And this rule has been followed in many cases in this country. It has been held that "the effect of an order granting a new trial on motion of one of the joint and several defendants was to vacate the former judgment, and operated as a new trial to all the defendants."

Gulf, etc., Rwy. Co. v *James*, 15 Am. Dec., 743, and cases cited.
Long v. *Garnett*, 45 Tex., 401.
Wooten v. *Kauffman*, 67 Tex., 488.
Riggs v. *Hatch*, 16 Fed., 839.
Ouly v. *Dickinson*, 5 Coldw., 486.
McGillis v. *Bishop*, 27 Ill. App., 53.

This court has held that where some defendants have not the right of appeal, while others have, the judgment of the lower court should be reversed as to all, the case being one in which the various parties stood in the relation of vendors, warrantors, and vendees. (*Findlaye* v. *Hinde*, 1 Pet., 241.)

In another case, where the judgment was erroneous as to the guarantor, the court held that it could not stand as against the principal, although the verdict was justified as to him. (*Draper* v. *State*, 1 Head, 262.)

In passing upon the same question, the Supreme Court of Tennessee said:

> A party has the right to appeal from a void judgment; and this judgment, being void as to such party, it is void as to the other joint defendants, for the judgment is entire and cannot be good in part and bad in part. (*Trousdale* v. *Donnell*, 4 Humph., 273.)

The conclusion to be drawn from these authorities is that it is not error to allow a motion as to all joint defendants where the application is made by only one; that the question is one which addresses itself to the discretion of the court in the circumstances of the case. The appellant's contention from the cases cited by him is only that the court *may* allow a new trial as to one party while permitting the judgment to stand as to the others.

The motion for new trial was granted by the Court of Claims on the whole case. The new trial was a new trial as to all parties and the judgment, by which the claimant's petition was dismissed, was a judgment in favor of the Cheyenne Indians as well as the United States. In so acting, the court exercised its undoubted discretion in the disposal of the motion for new trial, and its action in that respect is not reviewable.

If the action of the court could be reviewed here, it would be found to be eminently correct. The motion for new trial on behalf of the United States as guarantor was based upon grounds which went directly to the liability of the principal. No other

grounds would have availed the United States, since, as we have seen, the statute makes the United States liable in every case where the defendant Indians are liable. To grant the motion as to one party on grounds which affect the liability of both, and to leave the judgment standing, although equally wrongful, as to the other party, would have been to abuse the discretion of the court (if it possesses such discretion) and would be going farther from the old rule than any of the cases cited by the appellant.

More than this. If our contention is correct, the judgment rendered against the Indians and the United States was equally without jurisdiction as to both. It was a void judgment and its validity could be attacked collaterally in any other court. To hold with the appellant on this point would be to say that the Court of Claims, although retaining control of the judgment by reason of the pendency of the motion for new trial, could not set aside the judgment after the want of jurisdiction had been shown. The motion for new trial having been granted as to the whole case, and the petition now having been dismissed, the effect of the appellant's contention is to ask this court to revive a judgment which was void *ab initio*.

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